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No. 84-561 (2)

IN THE

Supreme Court of the United States

October Term 1984

G. M. SHUPE, INC.,
Petitioner,

v.

DRAVO CORPORATION,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

On April 12, 1982, the parties entered a contract (hereinafter "Consulting Agreement") under which plaintiff G. M. Shupe, Inc. would assist in the prosecution of 13 construction claims on

behalf of defendant Dravo Corporation. Amended Excerpts, p. 118. (Both the plaintiff corporation and G. M. Shupe, its owner, are referred to herein collectively as "Shupe.") Under the Consulting Agreement, Shupe received a monthly salary of $7,700, reimbursement for all expenses connected with his claims work, a 15 percent markup on all his expenses, plus bonus payments based upon the amounts recovered under the various claims. Amended Excerpts, p. 118.

One of the 13 claims listed in the Consulting Agreement was the Auld Valley claim. Shortly after the Consulting Agreement was signed, Dravo came to the conclusion that because Shupe had very little contact with the Auld Valley project the claim arising out of that project could best be developed by others. On September 7, 1972, after a meeting between the parties, Shupe and Dravo

agreed that Shupe would not participate in the Auld Valley claim. CR 40, p. 2; Amended Excerpts, p. 123. The September 7 letter agreement states:

> [Shupe] will withdraw from any Auld Valley project claim activity and relinquish any rights to remuneration if Dravo successfully negotiates a settlement of any claim related to this project.

Id. Shupe later disputed his agreement and between 1973 and 1975 he and Dravo had an ongoing dispute over whether Shupe was entitled to compensation for the Auld Valley claim. Amended Excerpts, pp. 7-8, 94-95, 99-100. During that time, Shupe continued work on the remaining claims listed in the Consulting Agreement, but at no time after March 1973 did he perform any work on the Auld Valley claim. CR 40, p. 3; Amended Excerpts, p. 86.

In 1975, Dravo desired to divorce itself from any further relationship with Shupe. By this time, Shupe had already

received enormous profits from the Consulting Agreement. CR 29, p.3; Amended Excerpts, pp. 135-41. In July 1975 the parties therefore initiated negotiations to terminate the Consulting Agreement and settle all claims for compensation under the agreement. CR 40, pp. 3-4; Amended Excerpts, pp. 97-100, 142. At that time many of Shupe's claims for compensation under the Consulting Agreement were disputed by Dravo. Amended Excerpts, pp. 97-103. During the July 1975 negotiations, the parties discussed each of their disputes and exchanged offers and counter-offers of settlement. Amended Excerpts, pp. 97-98, 102. Compensation for the Auld Valley claim was one of the items of dispute, and it was negotiated together with the other areas of disagreement. Amended Excerpts, pp. 97-100, 102.

The parties eventually agreed to a settlement amount by discounting several of Shupe's claims and by eliminating several others. The final settlement figure was $195,000.

The parties' settlement was embodied in a letter agreement dated July 11, 1975 which was signed by both parties. Amended Excerpts, pp. 99, 128. The agreement states in full:

> On April 5, 1972 G. M. Shupe, Inc. and Dravo Corporation entered into an agreement whereby G. M. Shupe, Inc. would prosecute certain contract claims as noted therein and be compensated according to the terms thereof.
>
> The Agreement was to terminate July 31, 1973 unless extended from month to month by mutual agreement, which it has been. It is now agreed between us that the above referenced agreement will be terminated as of June 30, 1975.
>
> It is further agreed that in consideration of the payment by Dravo to G. M. Shupe, Inc. of $195,000.00 that all compensation due G. M. Shupe, Inc.

> under said agreement is hereby satisfied and neither party shall have any rights or recourse against the other with respect thereto, or any matter mentioned therein, except as hereinafter noted.
>
> With respect to Homer Spit project it is agreed that the provision of the agreement pertaining thereto shall remain in effect until the Alaska Supreme Court makes a decision in the matter except that if a trial de novo is ordered, Dravo reserves the right not to proceed further.
>
> Further, with respect to the financing claim filed by DDC with the Corps of Engineers [re Dworshak Dam], it is agreed that should such claim be successful, Dravo and G. M. Shupe, Inc. will agree on a proper prorata payment to G. M. Shupe, Inc. as said claim relates to the claims participated in by G. M. Shupe, Inc. and for which compensation was paid under the terms of the April 5, 1972 Agreement.

Amended Excerpts, p. 128 (emphasis added). Dravo thereafter satisfied its obligations under the July 11, 1975 agreement (hereinafter "Release") by compensating Shupe in the amount of

$195,000. CR 29, p. 6. The Auld Valley Project, which was specifically listed as part of the 1972 Agreement, was not reserved as an exception to the Release.

Following termination of the Consulting Agreement, Dravo continued to independently develop the Auld Valley claim, which was finally settled in 1979. CR 4. Shupe learned of the settlement and demanded to be paid a huge commission out of the settlement proceeds. On March 9, 1982, after Dravo refused to pay anything more to Shupe than was required under the 1975 Release, Shupe filed this action for breach of contract and unjust enrichment. CR 1.

Shortly after the lawsuit was filed, Dravo moved for summary judgment. Dravo argued that the Release was unambiguous and barred Shupe's claim for additional compensation. The district court agreed and dismissed Shupe's case. On appeal,

the Ninth Circuit also agreed that the Release barred Shupe's claim and affirmed the dismissal of Shupe's case.

After Shupe had contested and lost his dismissal at both the district and circuit court levels, Shupe for the first time asked that an issue of state law be certified to the Washington Supreme Court. Dravo opposed the motion on three grounds: First, the certification issue framed by Shupe was not dispositive to the district and circuit court decisions; second, Shupe had not raised the certification issue in district court; finally, certification would unduly prolong the litigation. The Ninth Circuit denied Shupe's motion without opinion. Shupe petitions this court to review the Ninth Circuit's denial of this motion.

REASONS FOR DENYING THE WRIT

In his motion for certification, Shupe asked that the Washington Supreme Court choose between the "mechanical" and the "intent" tests for introduction of parol evidence. Under the "mechanical" test, parol evidence is never admissible to add to or contradict the terms of an unambiguous written instrument complete on its face. See, Brust v. McDonald's Corp., 34 Wn. App. 199, 205-06, 660 P.2d 320, 323-24 (1983). In contrast, the "intent" test permits the court to review parol evidence to determine whether a written agreement is an integration, or whether it embodies only a portion of what the parties agreed to. See id.

The Ninth Circuit's denial of certification was proper for three reasons. First, the certification issue framed by Shupe is not dispositive of either the district or circuit court holdings.

Second, the issue was not raised before the circuit court. Third, whether to certify an issue to state court is discretionary; Shupe has not even suggested that the Ninth Circuit abused its discretion.

I.

SHUPE'S CERTIFICATION ISSUE WAS IRRELEVANT TO DISPOSITION OF THIS CASE

After dismissal of his case by the district court and after affirmance by the circuit court, Shupe moved for certification of this issue to the Washington Supreme Court:

> Whether under Washington State law extrinsic evidence is admissible for the purpose of showing that a written contract, unambiguous on its face, was not intended by the parties to be the complete agreement between them.

In propounding this question, Shupe sought a State Supreme Court decision on whether parol evidence is admissible on

the issue of whether an unambiguous written contract is integrated. Shupe suggested that this issue was undecided under Washington law. Yet, regardless of how that issue might be resolved in state court, it would not have affected this case because it is uncontested that the 1975 Release was integrated. The Ninth Circuit's memorandum disposing of Shupe's appeal states, "The agreement is completely integrated and unambiguous." Memorandum, p. 2.

Washington law is and always has been that parol evidence is inadmissible to vary the terms of an unambiguous, integrated agreement.

> It is settled that a fully integrated agreement of a contractual nature may not be varied by extrinsic evidence, written or oral, so as to add to, subtract from, or contradict its provisions.

Lynch v. Higley, 8 Wn. App. 903, 908, 510, P.2d 663, 667 (1973): See Grant County

Constructors v. E. V. Lane Corp., 77 Wn.2d 110, 122, 459 P.2d 947, 954 (1969); Washington Fish & Oyster Co. v. G. P. Halferti & Co., 44 Wn. 2d 646, 658, 269 P.2d 806, 813 (1954) ("The rule is universal that the written contract itself must be resorted to as the source of authority for receiving parol evidence."); Brust v. MacDonald's Corp., 34 Wn. App. 199, 205-06, 660 P.2d 320, 232-24 (1983) (Both the "mechanical" and "intent" tests are applied to determine "whether" the parties intended the written document to be an integration of their mutual agreement").

Not only does Washington Case law prohibit as a general principal the use of parol evidence to create ambiguities in contracts, it applies that prohibition specifically to the interpretation of releases.

> When the release contains plain and unambiguous language, parol evidence will not be admitted to vary the release.

Beaver v. Estate of Harris, 67 Wn.2d 621, 627, 409 P.2d 143, 147 (1965): see Schwieger v. Harry W. Robbins & Co., 48 Wn.2d 22, 24 290 P.2d 984, 986 (1955); Betcher v. Kunz, 112 Wash. 563, 570, 192 Pac. 955, 957 (1920); Spokane Helicopter Service, Inc. v. Malone, 28 Wn. App. 377, 381, 623 P.2d 727, 730 (1981); Pepper v. Evanson, 70 Wn.2d 309, 313, 422 P.2d 817,820 (1967); Metropolitan Life Insurance Co. v. Ritz, 70 Wn.2d 317, 321, 422 P.2d 780, 783 (1967).

There is no issue in this case about the Release being the complete agreement between the parties. Shupe did not--and could not--submit to the district court any evidence to suggest that in 1975 the parties entered any agreements other than the Release. Whether under Washington

law parol evidence is ever admissible to show the existence of agreements collateral to a written agreement, that situation was not present in the case sub judice. Since the issue which Shupe would certify to the Washington State Supreme Court would not have affected the disposition of this case, Shupe's motion for certification was properly denied. See Ormsbee Development Co. v. Grace, 668 F.2d 1140, 1149 (10th Cir. 1982) (where issue is not determinative, certification is not proper).

II

BECAUSE IT WAS NOT RAISED BELOW, THE CERTIFICATION ISSUE WAS NOT AN APPROPRIATE APPELLATE ISSUE

In his appeal, Shupe claimed that the district court adopted the "mechanical" test for using parol evidence, and that it should have instead adopted the "intent" test. Yet this argument was

never made to the district court. Indeed, it was a case cited as authoritative by Shupe which the district court relied upon in rendering its summary judgment decision.

In opposition to defendant's motion for summary judgment, Shupe submitted an affidavit and a memorandum. Nowhere in either pleading did Shupe suggest that the district court should adopt the "intent" rather than the "mechanical" test. Rather, his only argument concerning interpretation of the Release was that the Release might be ambiguous. See Amended Excerpts, pp. 51-52. In his memorandum to the district court, Shupe cited the case of Pepper v. Evanson, 70 Wn.2d 309, 422 P.2d 817 (1967) as authoritative, and quoted specific language from that case. In rendering its decision, the district court quoted and relied upon the very language in Pepper which Shupe had

cited. The district court then found that as matter of law the Release was unambiguous. CR 40, p. 10.

On his appeal, Shupe attempted to argue that Pepper embodied the "mechanical" test and that the district court should not have relied upon it. Shupe attempted to pursue that argument in his motion for certification. Yet, the argument was never made to the district court. It is well settled that theories must be presented to the district court in order to be preserved for appellate review:

> An appellant may not urge as a ground for reversal a theory which he did not present when the case was before the trial court.

Roberson v. United States, 382 F.2d 714, 718 (9th Cir. 1967); see Short v. United Mine Workers of America 1950 Pension Trust, 728 F.2d 528, 532 n.6 (D.C. Cir. 1984) ("[W]e apply the general rule that litigative theories not pursued in the

trial court will not be entertained on appeal."); Seymour v. Coughlin Co., 609 F.2d 346, 348-49 (9th Cir. 1979). The district court ruled upon the theories which Shupe presented. Shupe did not urge the adoption of the "intent" test below and that issue was therefore not one requiring appellate review. The Ninth Circuit's denial of certification was therefore appropriate.

III

CERTIFICATION TO THE WASHINGTON SUPREME COURT IS DISCRETIONARY, AND THE NINTH CIRCUIT DID NOT ABUSE ITS DISCRETION

By Washington statute, federal courts have discretion to certify questions of state law to the Washington Supreme Court. See RCW 2.60.020. Shupe argues that the Ninth Circuit was required to certify his proposed issue to the Washington Supreme Court. Yet, this position ignores Lehman Brothers v. Jacob

Scheir, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed.2d 215, 220 (1974), where this court stated:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . Its use in a given case rests in the sound discretion of the federal courts.

A variety of federal courts have noted that the decision to certify a question of state law is discretionary and will be reversed only where that discretion is abused. See, e.g., Ormsbee Development Co. v. Grace, 668 F.2d 1140, 1149 (10th Cir. 1982) ("Certification is, and must remain, a discretionary function of the federal court, to be utilized, when available, to determine unsettled questions of state law."); Public Citizen, Health Research Group v. Commission on Medical Discipline of Maryland, 573 F.2d 863, 866 (4th Cir. 1978) (District court did not abuse discretion in refusing

request for certification); Farmer v. Travelers Indemnity Co., 539 F.2d 562, 563 (5th Cir. 1976) ("The decision to certify is discretionary with this Court."); State of Florida ex rel Shevin v. Exxon Corp., 526 F.2d 266, 274 (5th Cir. 1976) ("We use much judgment, restraint and discretion in certifying"), quoting Barnes v. Atlantic & Pacific Life Insurance Co. of America, 514 F.2d 704, 705 n.4 (5th Cir. 1975); Imel v. United States, 523 F.2d 853, 857 (10th Cir. 1975) (certification is discretionary).

In his petition, Shupe does not even suggest that the Ninth Circuit abused its discretion by refusing certification. Such a suggestion would be virtually impossible to defend. Of the many factors taken into account upon a request for certification, one consideration is the potential for delay. See State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d

266, 275 (5th Cir. 1976). In the present case, Shupe asked for certification only after he had lost on the merits before the district and circuit courts. He has offered no reasons for not requesting certification prior to the district court's decision, and no such reasons exist. On this basis alone, the Ninth Circuit was justified in dispensing with Shupe's eleventh hour attempt to resurrect a claim which had been laid to rest after more than two years of litigation. See Lehman Brothers v. Scheir, 416 U.S. 386, 393, 40 L. Ed.2d 215, 221, 94 S. Ct. 1741 (1974) (concurring opinion by Justice Rehnquist) (certification inappropriate where it would upset years of trial and appellate litigation, and where request for certification was made only after losses in both district and circuit courts).

CONCLUSION

In this Petition, Shupe seeks to reopen a claim which he litigated and lost in both the district court and the circuit court of appeals. Shupe argues that the Ninth Circuit should be required to certify an issue of state law to the Washington Supreme Court. Yet, Shupe offers no reason to reverse Lehman Brothers, which holds that such decisions are discretionary. For this reason, and because the proposed issue for certification is not dispositive and was not raised before the district court, Shupe's Petition for Writ of Certiorari should be denied.

DATED this 1st day of November, 1984.

Respectfully submitted,

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